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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JUDITH WATERS,

Plaintiff and Appellant,

v.

ARMANDO MUNOZ,

Defendant and Respondent.

E048918

(Super.Ct.No. INC065402)

OPINION

APPEAL from the Superior Court of Riverside County. Anthony R. Villalobos, Judge. Affirmed.

Law Offices of Scott N. Harlow and Scott N. Harlow for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

Plaintiff and appellant Judith Waters filed an order to show cause (OSC) for restraining orders against defendant and respondent Armando Munoz, on allegations that he was harassing her. After the action was dismissed, the trial court awarded attorney fees and costs in favor of defendant. Plaintiff now appeals, urging that the award of

attorney fees and costs was improper, because it was not accompanied by a timely memorandum of costs. We affirm.

FACTS AND PROCEDURAL HISTORY

As noted, plaintiff apparently filed an OSC proceeding for harassment against defendant. A temporary restraining order (TRO) apparently issued, but at the hearing on the OSC, the court dismissed the action. Thereafter, counsel for defendant moved for attorney fees and costs. The court granted the motion, ordering plaintiff to pay \$8,078.35 in attorney fees and costs. Plaintiff moved to set aside the judgment for attorney fees and costs, and the court ultimately granted the motion. The court set a hearing on a motion to tax costs, which was apparently vacated.

Then defendant filed a renewed motion for attorney fees and costs, as the prevailing party on the OSC matter. The moving papers indicated that defendant's earlier award had been set aside on the ground of attorney mistake or negligence, but that at the time of setting aside the earlier award, the trial court had indicated that defendant could bring a subsequent motion. The court further warned that the subsequent motion might result in an even higher award, however, because of the fees and costs incurred in litigating the motion to set aside the first attorney fees and costs order.

Defendant's moving papers explained the background as follows:

"Acting 'in pro per,' Plaintiff obtained Ex Parte restraining orders against the Defendant based upon a perjured declaration. To defend the action, Plaintiff's husband's deposition was first taken and he was unable to keep Plaintiff's story straight. The police officer called to the scene also testified in a deposition and it was revealed through police

reports produced at the deposition that Plaintiff had embarked upon a multi-year campaign to prevent the Defendant from operating his business know[n] as ‘The Doctor of Leaks’ from his home which is across the street from a ‘second home’ owned and seasonally occupied by Plaintiff and her husband, both of whom are retired Many incidents arising from the overtly aggressive conduct of Plaintiff (including the hosing down of Defendant’s vehicles when parked on the public street) were documented in police reports initiated at the request of Defendant”

After discovery, plaintiff’s counsel proposed to defense counsel to dismiss the case with a waiver of costs, but defense counsel declined to waive. Defendant’s attorney filed the earlier motion for costs and fees, which was granted. Plaintiff then appeared and stated that she had not been advised of the costs motion, perhaps because notice had not been forwarded from her seasonal home. Without hearing from plaintiff’s counsel, the court granted plaintiff’s motion to set aside the costs and fees award on the ground of attorney negligence.

In the new motion, defendant requested costs and attorney fees as the prevailing party: \$8,078.35 as originally requested for having to defend the spurious restraining order OSC, and an additional \$4,757 for opposing the set-aside motion.

Defendant’s motion was supported by a declaration of counsel outlining the conduct of the case, including extensive defense discovery. Counsel averred that he had spent 18.75 hours in defense of the action, and appended a billing statement. Paralegal services were also expended, and defendant incurred costs consisting of deposition reporter fees and other items. Again, a billing statement was attached. Additional

attorney fees and costs had been incurred in opposition to the motion to set aside the first costs award, and another statement was attached in support.

Plaintiff opposed the motion, asserting that defendant was not entitled to an award of costs and attorney fees at all. She urged that, under Code of Civil Procedure section 1033.5, subdivision (a)(10)(B), and California Rules of Court, rule 3.1700, defendant was required to file a memorandum of costs within 15 days after mailing of the notice of entry of judgment, or dismissal. The case had been dismissed on April 18, 2007, but the instant motion for costs had been filed in October 2008. Defendant had assertedly never filed a memorandum of costs; “[t]he filing of a Motion for Attorneys fees is also required, in addition to the serving and filing of the Memorandum of Costs, but it is insufficient standing on its own.”

Defendant responded by pointing out that the motion met the requirements of a memorandum of costs, although it may not have been titled “memorandum of costs.” Defendant noted that plaintiff had dismissed her OSC action on April 18, 2007, and that defendant filed a notice and motion for costs and attorney fees on April 30, 2007. That was the motion that had earlier been granted, and then set aside. Defendant also argued that, as plaintiff herself conceded, the trial court had discretion to relieve defense counsel under Code of Civil Procedure section 473, subdivision (b), for inadvertence or excusable mistake for any technical defects in the motion papers. Thus, defendant urged the court to look beyond the surface to the substance of the motions for costs, and to deem them the equivalent of a memorandum of costs.

The trial court granted defendant's renewed motion for costs and attorney fees, awarding \$8,078.35, the same as had been awarded on the first motion.

Plaintiff appeals, on the ground that defendant never presented a proper memorandum of costs.

ANALYSIS

I. Standard of Review

The only issue raised is whether defendant's motion papers were supported by a proper memorandum of costs. The question whether the documents submitted meet the requirements of the applicable statutes and rules of court presents a mixed question of fact and law—What was presented? Did it comply with the applicable requirements?—which we review de novo. (*CUNA Mutual Life Ins. Co. v. Los Angeles County Metropolitan Transportation Authority* (2003) 108 Cal.App.4th 382, 391 [if the question requires the reviewing court to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo].)

II. The Trial Court Properly Awarded Costs and Attorney Fees

Plaintiff contends that defendant cannot be awarded costs and attorney fees because he never filed a memorandum of costs in the case. Plaintiff refers us to the register of actions, presumably to support the conclusion that no document separately denominated a memorandum of costs was filed.

Defendant claimed attorney fees and costs under Code of Civil Procedure section 527.6, subdivision (i), which provides that “[t]he prevailing party in any action brought under this section [i.e., an OSC proceeding for harassment such as the plaintiff’s action here] may be awarded court costs and attorney’s fees, if any.” Plaintiff urges that defendant must nevertheless comply with proper procedures for making a claim, including Code of Civil Procedure section 1033.5, subd. (c)(5),¹ and California Rules of Court, rule 3.1700.² Plaintiff contends that defendant “has never served and filed a memorandum of costs pursuant to Cal Rules of Court, Rule 3.1700,” and that defendant has thereby waived any right to costs or attorney fees included within the definition of costs.

¹ When any statute of this state refers to the award of “costs and attorney’s fees,” attorney’s fees are an item and component of the costs to be awarded and are allowable as costs pursuant to subparagraph (B) of paragraph (10) of subdivision (a). Any claim not based upon the court’s established schedule of attorney’s fees for actions on a contract shall bear the burden of proof. Attorney’s fees allowable as costs pursuant to subparagraph (B) of paragraph (10) of subdivision (a) may be fixed as follows: (A) upon a noticed motion, (B) at the time a statement of decision is rendered, (C) upon application supported by affidavit made concurrently with a claim for other costs, or (D) upon entry of default judgment. Attorney’s fees allowable as costs pursuant to subparagraph (A) or (C) of paragraph (10) of subdivision (a) shall be fixed either upon a noticed motion or upon entry of a default judgment, unless otherwise provided by stipulation of the parties.

² A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment or dismissal by the clerk under Code of Civil Procedure section 664.5, or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first. The memorandum of costs must be verified by a statement of the party, attorney, or agent that to the best of his or her knowledge the items of cost are correct and were necessarily incurred in the case.

We reject plaintiff's claim that defendant waived any right to costs and attorney fees.

First, plaintiff has provided a record inadequate to review her contention. That is, to the extent plaintiff contends that defendant's initial motion papers were inadequate, she has failed to provide them in the record. Thus, we have no way of determining the issue on appeal. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141 [it is the burden of the party challenging a judgment on appeal to provide an adequate record to appeal error].) Defendant's reply to plaintiff's opposition to the renewed motion for costs and attorney fees plainly indicated that the motion itself was filed timely, within 15 days after plaintiff's OSC proceeding was dismissed.

Second, as defendant argued below, and as defendant's renewed motion papers substantiate, the motion papers themselves were fully adequate to comply with the requirements of a memorandum of costs, even if they were not so denominated. A memorandum of costs is required to be verified and show that the items of cost were "correct and were necessarily incurred in the case." (Cal. Rules of Court, rule 3.1700(a)(1).) Defendant provided itemized billings for both attorney fees and court costs incurred in the case, and counsel provided a declaration averring under penalty of perjury that the costs and attorney fees were correct and necessary. All of the purposes of the rule requiring a memorandum of costs were satisfied by the documents presented.³

³ This conclusion applies to the renewed motion for attorney fees and costs. As noted, plaintiff has failed to provide us with the original motion papers and has thus waived the contention as to that motion.

Plaintiff's contention on appeal elevates form over substance. (Civ. Code, § 3528.) The moving papers adequately complied with the substantive requirements of a memorandum of costs. The trial court properly awarded costs, including attorney fees.

DISPOSITION

The award of costs, including attorney fees, is affirmed. Defendant is awarded his costs on appeal.

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/s/ McKINSTER

J.

We concur:

/s/ HOLLENHORST

Acting P.J.

/s/ RICHLI

J.